



TAX EXEMPT AND
GOVERNMENT ENTITIES
DIVISION

DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
WASHINGTON, D.C. 20224

Number: **201336019**

Release Date: 9/6/2013

Date: June 13, 2013

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Uniform Issue List

4942.00-00

9100.00-00

Legend:

B =

C =

Company =

Date 1 =

Date 2 =

Date 3 =

Date 4 =

x1 =

x2 =

x3 =

Contact Person:

Identification Number:

Telephone Number:

Employer Identification Number:

Dear Sir or Madam:

This is in response to your ruling request of April 6, 2012 for discretionary relief under Treas. Reg. § 301.9100-3, for an extension of time to make the election under Treas. Reg. § 53.4942(a)-3(c)(2)(iv).

FACTS

You are recognized as exempt from federal income taxes under § 501(c)(3) and classified as a private foundation under § 509(a). You are "organized to support health, human services, the arts, education and the environment through organizations that are recognized as exempt from federal income taxes under § 501(c)(3)."

During tax year ending Date 1, you received stock contributions in the amount of x1 from B and C. As a result, B claimed tax deductions equal to the appraised fair market value of the stocks B contributed to you. You state that B is a substantial contributor to you, and as such, is a disqualified person under § 4946.

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During the tax year ending Date 1, you distributed qualifying distributions in the amount of x2, an amount less than 100 percent of the contributions you received in the tax year ending Date 1. On your Form 990-PF, Return of Private Foundation, for tax year ending Date 1 ("Return"), you reported that you have excess qualifying distributions from the prior preceding five years in the amount of x3. You did not use any of the excess qualifying distributions for any other purpose, and you do not intend to use that amount for any other purpose.

You state that Company, a capital management firm, handles your taxes. Company also handles B's individual taxes. One of Company's employees, a tax attorney ("Attorney") with experience filing individual and foundation taxes whom you consider experienced and who has always provided you competent and reliable tax advices and services, prepared the Date 1 Return. Under the guidance of Company and Attorney, you mailed Return timely after an extension on Date 2, and unintentionally and without knowledge, omitted to elect to treat the excess qualifying distributions of the preceding years as a current distribution out of corpus as provided under Treas. Reg. § 53.4942(a)-3(c)(2)(iv) ("Election") to meet the distribution requirements of § 170(b)(1)(F)(ii). You state that because Company and Attorney omitted to communicate to you the requirement to make the Election and failed to notify you to attach the Election to Return, you were unaware of the Election requirement.

You state, under penalties of perjury, that you "[d]id not have any knowledge or reason to believe that such advisors were not fully competent to render advice on necessary regulatory elections or that their advisors were not aware of all relevant facts." B, under the assumption you made Election, claimed a charitable deduction as a result of B's contribution to you. You submitted a sworn affidavit by B, which states B, claimed a charitable deduction for contributing stocks to you under the assumption you filed Election.

In early Date 3, during review of C's previously filed tax return for tax year ending Date 1 by a tax advisory firm, ("Firm"), Firm discovered your omission to make and attach the Election. Immediately, Firm notified you about this omission, and you decided to immediately seek permission from the Internal Revenue Service ("Service") to make and attach a late election. You submitted a sworn affidavit from one of Firm's officers that states you became aware of your omission to make and attach the Election after Firm brought the omission to your attention.

You submitted additional sworn affidavits from your officers and Attorney. The affidavit from your officers states that Company and Attorney did not communicate or discuss the Election with you. The affidavit from Attorney states Attorney:

- (a) was unaware of the Election
- (b) was aware of B's intent to obtain maximum tax benefits because of the contribution B made to you, and
- (c) would have made the Election had Attorney known about the Election.

In addition, you attached a copy of Return to this ruling request and a copy of the Treas. Reg. § 53.4942(a)-3(c)(2)(iv) election you omitted to include with Return you mailed on Date 2.

You also attached a copy of B's Form 1040 tax return charitable contribution schedule which shows that B filed the tax return under the assumption you made the Election. You stated that B's return for tax year ending Date 1 will not be affected if you are permitted to make and attach

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the Election.

Last, you state that you "discovered the failure to make the regulatory election and submitted this request for relief before the failure to make the regulatory election was discovered by IRS." You also state that you are not under examination by the Service, and as of the date of this ruling request, you have not received any communication from the Service regarding your omission to make the Election.

RULING REQUESTED

Based on the above facts, you request a ruling for discretionary additional time under Treas. Reg. § 301.9100-3 to file the § 53.4942(a)-3(c)(2)(iv) election for your tax year ending Date 1.

LAW

I.R.C. § 170(b)(1)(F)(ii) provides, in part, that contributions by an individual to a private foundation that makes qualifying distributions that are treated as distributions out of corpus in an amount equal to 100 percent of the contribution within three months and 15 days of the end of the private foundation's taxable year, are deductible at 50 percent of the taxpayer's contribution base for the taxable year.

I.R.C. § 4942(a) provides for the imposition on the undistributed income of a private foundation for any taxable year, which has not been distributed before the first day of the second (or any succeeding) taxable year following such taxable year (if such first day falls within the taxable period), a tax equal to 30 percent of the amount of such income remaining undistributed at the beginning of such second (or succeeding) taxable year.

I.R.C. § 4942(d) defines a private foundation's "distributable amount" for any taxable year as an amount equal to (1) the sum of the minimum investment return plus the amounts described in subsection (f)(2)(C), reduced by (2) the sum of the taxes imposed on such private foundation for the taxable year under subtitle A and § 4940.

I.R.C. § 4942(h) provides rules as to the treatment of "qualifying distributions" made during a taxable year. Generally, qualifying distributions for a taxable year are treated as made (A) first out of the undistributed income of the immediately preceding taxable year (if the private foundation was subject to tax imposed by this section for the preceding year) to the extent thereof, (B) second out of undistributed income for the taxable year to the extent thereof, and (C) then out of corpus.

Treas. Reg. § 53.4942(a)-3(c)(2)(iv) provides that a donee organization may elect to treat as a current distribution out of corpus any amount distributed in a prior taxable year which was treated as a distribution out of corpus under paragraph (d)(1)(iii) of this section provided that (a) such amount has not been availed of for any other purpose, such as a carryover under paragraph (e) of this section or a redistribution under this paragraph for a prior year, (b) such corpus distribution occurred within the preceding 5 years, and (c) such amount is not later availed of for any other purpose. Such election must be made by attaching a statement to the return the foundation is required to file under § 6033 with respect to the taxable year for which

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such election is to apply. Such statement must contain a declaration by an appropriate foundation manager (within the meaning of § 4946(b)(1)) that the foundation is making an election under this paragraph and it must specify that the distribution was treated under paragraph (d)(1)(iii) of this section as a distribution out of corpus in a designated prior taxable year (or years). This election is permissible in order to satisfy distribution requirements under § 170(b)(1)(F)(ii).

Treas. Reg. § 301.9100-3(a) provides that requests for extensions of time for regulatory elections may be granted when the taxpayer provides evidence to establish to the satisfaction of the Commissioner that the taxpayer acted reasonably and in good faith, and the grant of relief will not prejudice the interests of the Government.

Treas. Reg. § 301.9100-3(b)(1) provides that a taxpayer is deemed to have acted reasonably and in good faith if the taxpayer:

- (i) Requests relief under this section before the failure to make the regulatory election is discovered by the Service;
- (ii) Failed to make the election because of intervening events beyond the taxpayer's control;
- (iii) Failed to make the election because, after exercising reasonable diligence (taking into account the taxpayer's experience and the complexity of the return or issue), the taxpayer was unaware of the necessity for the election;
- (iv) Reasonably relied on the written advice of the Service; or
- (v) Reasonably relied on a qualified tax professional, including a tax professional employed by the taxpayer, and the tax professional failed to make, or advise the taxpayer to make the election.

Treas. Reg. § 301.9100-3(b)(2) provides that a taxpayer will not be considered to have reasonably relied on a qualified tax professional if the taxpayer knew or should have known that the professional was not:

- (i) Competent to render advice on the regulatory election; or
- (ii) Aware of all relevant facts.

Treas. Reg. § 301.9100-3(b)(3)(ii) provides, in part, that a taxpayer is deemed to have not acted reasonably and in good faith if the taxpayer was informed in all material respects of the required election and related tax consequences, but chose not to file the election.

Treas. Reg. § 301.9100-3(c)(1) provides that the Commissioner will grant a reasonable extension of time to make a regulatory election only when the interests of the Government will not be prejudiced by the granting of relief.

Treas. Reg. § 301.9100-3(c)(1)(i) provides, in part, that the interests of the Government are prejudiced if granting relief would result in a taxpayer having a lower tax liability in the aggregate for all taxable years affected by the election than the taxpayer would have had if the election had been timely made.

Treas. Reg. § 301.9100-3(d)(2) provides, in part, that for relief to be granted, the Service may

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require the taxpayer to consent under § 6501(c)(4) to an extension of the period of limitations on assessment for the taxable year in which the regulatory election should have been made and any taxable years that would have been affected by the election had it been timely made.

Treas. Reg. § 301.9100-3(e) (2) & (3) specifies evidence which must be provided when a taxpayer requests relief under this section which includes (a) affidavit and declaration from taxpayer and (b) affidavits and declarations from other parties.

Treas. Reg. § 301.9100-3(e)(4) further requires additional information to support request for relief under § 301.9100-3(a) which includes:

- (i) The taxpayer must state whether the taxpayer's return(s) for the taxable year in which the regulatory election should have been made or any taxable years that would have been affected by the election had it been timely made is being examined by a district director, or is being considered by an appeals office or a federal court. The taxpayer must notify the Service office considering the request for relief if the Service starts an examination of any such return while the taxpayer's request for relief is pending;
- (ii) The taxpayer must state when the applicable return, form, or statement used to make the election was required to be filed and when it was actually filed;
- (iii) The taxpayer must submit a copy of any documents that refer to the election;
- (iv) When requested, the taxpayer must submit a copy of the taxpayer's return for any taxable year for which the taxpayer requests an extension of time to make the election and any return affected by the election; and
- (v) When applicable, the taxpayer must submit a copy of the returns of other taxpayers affected by the election.

Internal Revenue Manual 1.2.53.4 (03-24-2001), Delegation Order 30-3 (formerly DO-183, Rev. 8), Extension of Time for Making Certain Elections, provides, in part, authority to grant a reasonable extension of the time fixed by regulations for the making of an election or application for relief in respect of tax under all subtitles of the Code, except subtitles E, G, H, and I, subject to the requirements of Treas. Reg. § 301.9100-1. Authority is delegated to Director, EO; Manager, EO Technical; Manager, EO Technical Guidance and Quality Assurance.

ANALYSIS

Pursuant to § 4942(a), taxes are imposed on the undistributed income of a private foundation for any taxable year which has not been distributed before the first day of the second, or any succeeding, taxable year following such taxable year. See § 4942(d) which defines "distributable amount".

Section 53.4942(a)-3(c)(2)(iv) provides that a donee organization may elect to treat as a current distribution out of corpus any amount distributed in a prior taxable year which was treated as a distribution out of corpus under paragraph (d)(1)(iii) of this section provided that (a) such amount has not been availed of for any other purpose, such as a carryover under paragraph (e) of this section or a redistribution under this paragraph for a prior year, (b) such corpus distribution occurred within the preceding 5 years, and (c) such amount is not later availed of for any other purpose. Such election must be made by attaching a statement to the return the foundation is required to file under § 6033 with respect to the taxable year for which such

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election is to apply. Such statement must contain a declaration by an appropriate foundation manager, within the meaning of § 4946(b)(1) that the foundation is making an election under this paragraph and it must specify that the distribution was treated under paragraph (d)(1)(iii) of this section as a distribution out of corpus in a designated prior taxable year, or years. This election is permissible in order to satisfy distribution requirements under § 170(b)(1)(F)(ii).

When a taxpayer makes a § 53.4942(a)-3(c)(2)(iv) election to satisfy the distribution requirements under § 170(b)(1)(F)(ii), a taxpayer must make such an election by attaching a statement to its return with respect to the taxable year for which such election is to apply. Section 53.4942(a)-3(c)(3)(iv) provides that the statement must contain a declaration by an appropriate manager of the taxpayer which must state that the taxpayer is making such an election and specify the proper distribution treatment as a distribution out of corpus in a designated prior taxable year, or years. Here, you did not make such an election when you timely filed your Form 990-PF for the tax year ending Date 1. You state that in tax year ending Date 1, you met the requirement to make the Election, but in good faith, you mistakenly and without knowledge, omitted to make the Election. You stated that you omitted to make the Election because you relied upon the advice of a qualified tax professional who failed to neither advise you about the Election nor make the Election on your behalf. Thus, you were unaware that you were required to attach the Election to Return.

However, under § 301.9100-3(a), if a taxpayer, when required, omits to make the § 53.4942(a)-3(c)(2)(iv) election, a request for an extension of time for regulatory election(s) may be granted if the taxpayer provides evidence to establish to the satisfaction of the Commissioner that the Taxpayer acted reasonably and in good faith, and the grant of relief will not prejudice the interests of the Government. A taxpayer will be deemed to have acted reasonably and in good faith if, among other things, the taxpayer requests relief under this section before the failure to make the regulatory election is discovered by the Service or if taxpayer reasonably relied on a qualified tax professional, including a tax professional employed by the taxpayer, and the tax professional failed to make, or advise the taxpayer to make, the election, among others. See § 301.9100-3(b)(1). Section 301.9100-3(b)(2) provides that a taxpayer will not be considered to have reasonably relied on a qualified tax professional if the taxpayer knew or should have known that the professional was not competent to render advice on the regulatory election or aware of all the relevant facts.

You have submitted documentation showing that you acted reasonably and in good faith under § 301.9100-3(b)(1) in that you reasonably relied on Company and Attorney who unintentionally and without knowledge failed to make, and failed to advise you to make the election for the tax year ending Date 1. You also represented that you had no knowledge or reason to believe that Attorney and Company were not fully competent to render tax advice on necessary regulatory elections. Such documentation included affidavits and other evidence to sustain your claim that you acted in good faith, to support your request for an extension of time under § 301.9100-3(a) to file the Election which satisfy the procedural requirements for relief under §§ 301.9100-3(e)(2) and (3).

You must also demonstrate that the interests of the Government will not be prejudiced by the granting of relief pursuant to § 301.9100-3(c) to qualify for discretionary relief under § 301.9100-3(a). An example of a prejudice to the Government occurs when such an extension results in a taxpayer having a lower tax liability in the aggregate for all taxable years affected by the election

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than the taxpayer would have had if the election had been timely made. See § 301.9100-3(c)(1)(i). See also § 301.9100-3(e)(4). B's individual tax return for tax year ending Date 1 will remain the same because B filed tax return for tax year ending Date 1 under the assumption you correctly filed Return which would have included the Election. Thus, granting the extension under § 301.9100-3(a) will not result in B having a lower tax liability or prejudicing the Government's interest.

You filed your Form 990-PF return for the year ending Date 1, reporting excess qualifying distributions from the prior preceding five years in the amount of x3. You did not use any of the excess qualifying distributions for any other purpose, and you do not intend to use that amount for any other purpose. Thus, granting the extension under § 301.9100-3(a) will not result in you having a lower tax liability or prejudicing the Government's interest.

Before the Service discovered your omission, you filed this ruling request, and requested for relief to make the Election. A taxpayer will be deemed to have acted reasonably and in good faith if the taxpayer requests relief under this section before the failure to make the regulatory election is discovered by the Service, among others. See § 301.9100-3(b)(1).

Your omission to make the Election was reasonable and in good faith as provided under § 301.9100-3(b)(1)(v). Further, you requested relief to make Election before the Service discovered your omission to make the Election. In addition, since the Government's interest will not be prejudiced as a result of your omission to make the Election, or if given the permission to make a late Election, you are entitled to an extension of time under § 301.9100-3(a) to make the Election.

We note that the figures in your Return for your tax year ending Date 1 for excess qualifying distribution carryovers for the preceding five years were determined incorrectly and overstated. In each year, your qualifying distributions for the year exceeded your distributable amount, and you did not use qualifying distributions (either current-year or carryovers) for any purpose other than satisfying the current-year distributable amount. Under these circumstances, your excess distribution carryover for each of the five years preceding the year ending Date 1 is the amount of qualifying distributions made in that year minus the distributable amount for that year (regardless of your elections to treat current-year qualifying distributions as made out of corpus and use of carryovers to satisfy your distributable amount for each year). See § 53.4942(a)-3(e)(2). These revised, reduced carryover figures are still sufficient for you to meet the pass-through requirements of § 170(b)(1)(F)(ii) for your tax year ending Date 1, with a smaller carryover to subsequent years.

RULINGS

Based on the facts and circumstances represented, the Commissioner, through his delegate, Manager, Exempt Organization Technical has exercised his authority under § 301.9100-3, to grant you an extension of time in which to make an election under § 53.4942(a)-3(c)(2)(iv) for your tax year ending Date 1. The election shall be made by filing an amended Form 990-PF return for your tax year ending Date 1 and attaching a statement making the election. You shall have an additional 60 days from the date of this letter ruling to file the amended return. The amended return and subsequent returns filed should reflect the revised carryover figures.

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This ruling will be made available for public inspection under § 6110 after certain deletions of identifying information are made. For details, see enclosed Notice 437, *Notice of Intention to Disclose*. A copy of this ruling with deletions that we intend to make available for public inspection is attached to Notice 437. If you disagree with our proposed deletions, you should follow the instructions in Notice 437.

This ruling is directed only to the organization that requested it. Section 6110(k)(3) provides that it may not be used or cited by others as precedent.

This ruling is based on the facts as they were presented and on the understanding that there will be no material changes in these facts. This ruling does not address the applicability of any section of the Code or regulations to the facts submitted other than with respect to the sections described. This office does not have jurisdiction over § 170. Therefore, this ruling does not address the propriety of deductions under § 170 or whether the facts presented by the taxpayer with regard to § 170 are correct. Because it could help resolve questions concerning your federal income tax status, this ruling should be kept in your permanent records.

If you have any questions about this ruling, please contact the person whose name and telephone number are shown in the heading of this letter.

In accordance with the Power of Attorney currently on file with the Service, we are sending a copy of this letter to your authorized representative.

Sincerely,

Michael Seto
Manager, EO Technical

Enclosure
Notice 437